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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

JAN - 7 1998  
**FEDERAL COMMUNICATIONS COMMISSION**  
OFFICE OF THE SECRETARY

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In the Matter of )  
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CC Docket No. 96-128

Implementation of the Pay Telephone )  
Reclassification and Compensation )  
Provisions of the Telecommunications )  
Act of 1996 )  
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**CONSOLIDATED COMMENTS OF THE  
AD HOC TELECOMMUNICATIONS USERS COMMITTEE  
ON PETITIONS FOR RECONSIDERATION**

The Ad Hoc Telecommunications Users Committee (the "Ad Hoc Committee" or "Ad Hoc") submits these Comments in support of the Petitions for Reconsideration of the *Second Report and Order*<sup>1</sup> filed by The Dispatching Parties, The Direct Marketing Association ("DMA"), AT&T Corp. ("AT&T") and The Consumer-Business Coalition for Fair Payphone 800-Fees ("Consumer-Business Coalition").

The Ad Hoc Committee's members include several large toll free service subscribers. With the advent of the Commission's recent decisions implementing Section 276 of the Communications Act of 1934, as amended (the "Act"), these and other subscribers have experienced substantial increases in the rates and charges attributable to toll free calls received from pay telephones.<sup>2</sup> These rate increases

<sup>1</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Second Report and Order, CC Dkt. No. 96-128, FCC 97-371 (released October 9, 1997) ("Second Report and Order").*

<sup>2</sup> See Consumer-Business Coalition Comments at 7-10.

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stem from the Commission's erroneous finding that the "market-based" rate of 28.4 cents per call constitutes fair compensation under Section 276.

Ad Hoc supports those petitioners that request reconsideration of the Commission's decision to implement a market-based approach, and instead urge the adoption of a forward looking, incremental cost based standard for measuring per call compensation.<sup>3</sup> Ad Hoc also supports the modified carrier pays approach advocated by several petitioners, as this approach is more consistent with a competitive marketplace, better aligned with the public interest, and more effective in deterring payphone fraud than the system currently in place.

#### I. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO ADOPT A MARKET-BASED COMPENSATION SYSTEM

Throughout the payphone proceedings, Ad Hoc has advocated a cost-based methodology for determining payphone compensation. The cost-based analysis advocated by several petitioners<sup>4</sup> is consistent with the guidelines set forth by the FCC governing how the cost of service, or elements of service, should be analyzed in order to allow consumers to "reap the benefits of competition."<sup>5</sup> The Commission's failure to adopt such a scheme flies in the face of this objective.

The Commission believes that the marketplace will dictate a reasonable and just per call compensation rate. In its original *Reconsideration Order*, the

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<sup>3</sup> *Id.* at 22-25; AT&T Comments at 7-12.

<sup>4</sup> See Letter to Secretary Caton, dated November 4, 1996; Ad Hoc Ex Parte Presentation, CC Docket No. 96-128, dated September 26, 1997.

<sup>5</sup> See, e.g., Consumer-Business Coalition Comments at 22-23, citing *Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15,499, ¶¶ 679, 620 (1996).

Commission concluded that "carriers have significant leverage within the marketplace to negotiate for lower per-call compensation amounts . . . and to block subscriber 800 calls from payphones when the associated compensation amounts are not agreeable to the carrier."<sup>6</sup> As several petitioners have noted, however, the Commission's reasoning contains numerous flaws.

Like the Consumer-Business Coalition, Ad Hoc is concerned that, contrary to the Commission's analysis, the payphone market is not, and may never be, competitive.<sup>7</sup> The pay telephone industry currently is one based on locational monopolies. Unlike loaves of bread on a grocery store shelf, pay telephones provided by different payphone service providers ("PSPs") seldom line the walls at a single location, allowing an individual to comparison shop. To the contrary, customers who need a payphone take what they can get, where they can get it – which typically will mean no choice at all at a particular location.

Second, even were the locational monopoly to erode over time, there is insufficient identity between the consumer and the purchaser of payphone services to yield a competitive marketplace. Giving callers a choice of different PSP-provided pay telephones presumes that callers will care about which pay telephone they use to make a toll free call – which they should not, given that the carrier or toll free service subscriber, and not the caller, is paying for the call. Indeed, there is no

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<sup>6</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 11 FCC Rcd 21233, at ¶ 66 (1996) ("Reconsideration Order").

<sup>7</sup> Consumer-Business Coalition Comments at 4.

direct relationship between the ultimate buyer (the toll free service subscriber) and the seller (the PSP).<sup>8</sup> Rather, wedged between these two entities are the caller who faces no perceptible adverse consequence for choosing to make a toll free call, and the carrier, who pays the PSP, but has the ability to pass through its costs to the toll free service subscriber. The toll free service subscriber, the entity most injured by the PSPs' exorbitant rates (to the extent carriers continue to pass through such charges), has little if any leverage over the PSP to compel a reduced per call rate.

Finally, as several petitioners correctly argue, blocking, which the Commission relies upon as a marketplace check, may not be a feasible option.<sup>9</sup> At this time, carriers still have no ability to block on a PSP by PSP basis, let alone the ability to block on a payphone specific basis.<sup>10</sup> Moreover, blocking numbers at pay telephones can be a significant liability to businesses that rely on the widespread availability of their toll free number(s) to attract customers. Thus, the choice the Commission relies upon to justify its market-based system is, as found by the Consumers-Business Coalition, "largely illusory."<sup>11</sup>

For all these reasons, Ad Hoc urges the Commission to reconsider its decision to adopt a market-based per call compensation system under Section 276. Such a system is not reasonable under current market conditions, and may never be, due to the nature of the service provided. "Fair compensation" should not

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<sup>8</sup> See AT&T Comments at 6.

<sup>9</sup> Consumer-Business Coalition at 4; The Dispatching Parties at 4; Mobile Telecommunication Technologies Corp. Comments at 2-6.

<sup>10</sup> See Source One Wireless II, L.L.C. Comments at 3-4.

<sup>11</sup> Consumer-Business Coalition at 4.

require one party to bear an undue burden at the expense of another. Petitioners to this proceeding provide ample proof that the *Second Report and Order* promises to do just that, in direct contravention of Section 276.

**II. THE COMMISSION SHOULD ADOPT A MODIFIED CARRIER PAYS SYSTEM THAT WILL BOTH ENHANCE THE COMPETITIVENESS OF THE PAYPHONE MARKET AND PROTECT THE PUBLIC INTEREST**

Whether or not the Commission upholds its market-based compensation plan, Ad Hoc joins The Dispatching Parties in urging the Commission to adopt a modified carrier pays scheme that will give toll free service subscribers and their callers a more practical alternative to the all or nothing, pay or block approach. Under The Dispatching Parties' proposal, callers would be notified when a toll free number is blocked and would have the option to override the blocked number by depositing a coin in the payphone instrument.<sup>12</sup> This scheme benefits the public interest; it is more consistent with a market-based system than the current system; and it reduces the likelihood of fraud and abuse by PSPs.

**A. A Modified Carrier Pays Scheme Is Consistent With the Public Interest.**

The Consumer-Business Coalition argues that the Commission's *Second Report and Order* violates Section 276 of the Act because it adopts a compensation rate that is contrary "to the benefit of the general public."<sup>13</sup> Ad Hoc shares this

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<sup>12</sup> The Dispatching Parties Comments at 5. The Ad Hoc Committee favors this approach over the approach recommended by PageMart Wireless, Inc. ("PageMart"), which would require the Commission to add a new 8XX code for callers willing to unblock blocked numbers. See PageMart Comments at 8-9. Although the PageMart approach effectively accomplishes the same goals as The Dispatching Parties' approach, it would likely exacerbate the exhaustion of number resources, confuse callers, and unnecessarily complicate billing of payphone calls.

<sup>13</sup> Consumer-Business Coalition at 4; see also The Direct Marketing Association Comments at 3-4.

concern. The new payphone compensation rate promises to increase costs for toll free service subscribers by millions of dollars. In many cases, the industries affected by this cost increase and their customers *rely* on the fact that the toll free numbers may be accessed from all telephones, including public pay telephones. According to AAA, for example, a significant number of its road side assistance calls derive from pay telephones.<sup>14</sup> For this and other similar businesses, call blocking simply may not be an option. In addition, these subscribers may not be able to readily recover the additional costs incurred due to per call compensation because the existing contractual obligations with their customers preclude such cost recovery.<sup>15</sup> On the other hand, for non-profit organizations and government agencies, paying the per call fee also may not be an option since they have no means of recovering their costs. The National Network to End Domestic Violence estimated that a material portion of its toll free hotline calls originate at pay telephones.<sup>16</sup> For public service organizations that operate on a shoestring budget, permanently closing their doors to payphone callers may be the only alternative, even though it may be those same callers who most need the assistance of such organizations.<sup>17</sup>

In all cases, the public will be harmed by the Commission's all or nothing approach, either in the form of increased consumer costs or the inability to access

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<sup>14</sup> Consumer-Business Coalition at 14.

<sup>15</sup> *Id.* at 11.

<sup>16</sup> *Id.* at 14-15.

<sup>17</sup> See The Direct Marketing Association Comments at 2-4.

toll free numbers – in some cases in emergency situations. The modified carrier pays proposal suggested by The Dispatching Parties gives toll free service subscribers a realistic choice, and at the same time preserves a consumer's ability to dial a toll free number from all telephones. In the end, the public interest will be much less compromised than it is under the Commission's current rules.

**B. A Modified Carrier Pays Scheme Is Consistent With a Competitive Marketplace.**

The Commission's decision regarding "who pays" is premised on its determination that the "primary economic beneficiary" of a toll free or dial around payphone call should be responsible for paying per call compensation, and that it is the carrier that fits this description.<sup>18</sup> With respect to toll free calls in particular, the Commission found that "the called party . . . receives greater economic benefit from the payphone call than the calling party" and that the carrier "can best pass on . . . any charges for compensable calls to the appropriate customer."<sup>19</sup> The Commission is only partially correct, however. In some cases, the carrier pays approach may appropriately allocate the payment obligation. In many other instances, however, it fails. In those cases, another, more sophisticated approach is needed to ensure that the Commission's cost-benefit analysis operates at every level. The modified carrier pays approach achieves that goal.

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<sup>18</sup> *Reconsideration Order* at ¶ 88.

<sup>19</sup> *Id.*

As discussed above, for some toll free subscribers, such as government agencies, non-profit organizations or even businesses, the costs incurred in accepting a payphone call may outweigh any benefits incurred, particularly where the subscriber has no means of recovering its costs. At the present time, however, the only alternative to paying compensation is to block all calls from a particular PSP (to the extent such call blocking is even available), leaving the potential calling party unable to make a toll free call even where the caller would most gain from being able to make that call – such as in a domestic abuse situation, or a travel emergency. The way to address these possible scenarios is to allow the market to work at different levels, giving each of the affected parties, including the caller, control over whether making or receiving a payphone call to a toll free number is worth the per call cost.<sup>20</sup>

The modified carrier pays scheme does just that. It gives toll free subscribers a viable alternative to the all or nothing carrier pays system.<sup>21</sup> It takes into account those types of situations where the primary beneficiary of a

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<sup>20</sup> Such a scheme, moreover, does not violate the Telephone Operator Consumer Services Improvement Act ("TOCSIA") since the policy considerations are markedly different. First, as the Commission already recognized on reconsideration, TOCSIA does not apply to toll free service subscriber calls. See *Reconsideration Order* at ¶ 89. Second, a modified carrier scheme does not prescribe advanced payment in order to make toll free calls, but instead gives consumers the choice to make calls they could not otherwise make due to call blocking.

<sup>21</sup> In this regard, call blocking under a modified carrier pays system also may be a more effective check on uncompetitive per call rates. Petitioners in this proceeding make clear that, contrary to the Commission's reasoning, total call blocking is not necessarily an effective option for subscribers that believe PSP rates are excessive, particularly for those subscribers that depend on widespread customer access. Under those circumstances, a PSP may continue to gouge the carrier and subscriber with exorbitant rates, and the subscriber has no practical recourse. Under the modified carrier pays system, subscribers have the flexibility to block calls from PSP telephones whose rates are excessive without sacrificing customer access. Call blocking under such circumstances may serve as a more successful market signal, tempering inflated PSP rates.



call is the caller, and not the carrier or the toll free subscriber. More importantly, it restores a consumer's autonomy to determine whether placing a toll free or dial around call from a blocked pay telephone is in his or her best interests -- all of which is consistent with how a competitive marketplace *should* work.

C. A Modified Caller Pays Scheme Will Deter Fraud.

Several petitioners argue that the increased per call rates will trigger a rise in the incidence of payphone fraud.<sup>22</sup> According to The Dispatching Parties, this concern is very real.<sup>23</sup> Already, one of its members has identified 500 calls in a single week that are fraud-based. It is unlikely, however, that many businesses will be equipped to continually monitor calls and determine how many fraudulent calls they receive and from which pay telephone(s) these calls originate. Moreover, even where a subscriber is cognizant of a fraud problem, under the current system, total call blocking of a PSP's telephones may not be a reasonable or realistic solution. The Commission, meanwhile, has rejected other possible alternatives for deterring fraud -- such as exempting calls that do not meet a minimum duration requirement -- thereby tying the hands of toll free service subscribers so they are unable to effectively defend against payphone fraud.

A modified carrier pays system offers subscribers a more reasonable alternative where fraud is or becomes a problem, since subscribers can guard

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<sup>22</sup> Consumer-Business Coalition at 10; The Dispatching Parties at 3-4.

<sup>23</sup> The Dispatching Parties at 3.

against fraud through call blocking, but still allow customers access to their toll free numbers. In some cases, a subscriber may determine that call blocking does not make sense under the circumstances, even where fraud is a known concern. This will be the subscriber's choice, however. And the choice will be a meaningful one.

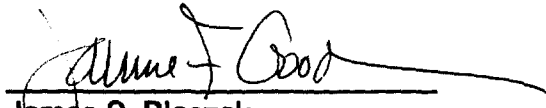
### **CONCLUSION**

For the foregoing reasons, Ad Hoc urges the Commission to grant petitions requesting reconsideration of the market-based compensation scheme adopted in the *Second Report and Order*. In addition, the Commission should adopt a modified carrier pays system, which promotes two of the Act's most fundamental objectives -- to foster a more competitive marketplace and to safeguard the public interest.

Respectfully submitted,

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January 7, 1998

200.01/Payphone/Com Payphone Recon

## **CERTIFICATE OF SERVICE**

I, Kurt A. Kaiser, hereby certify that on the 7<sup>th</sup> day of January, 1998, true and correct copies of the foregoing Consolidated Comments of the Ad Hoc Telecommunications Users Committee on Petitions for Reconsideration in CC Dkt. No. 96-128 were either hand-delivered\* or sent by first class, postage prepaid mail to the following list of parties:

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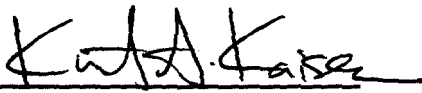
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